BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

FUTUREWISE, PILCHUCK AUDUBON SOCIETY, AND THE TULALIP TRIBES, Petitioners, v. SNOHOMISH COUNTY, Respondent.	**CASE No. 15-3-0012c** **FINAL DECISION AND ORDER**

SYNOPSIS

Futurewise and the Pilchuck Audubon Society as well as The Tulalip Tribes challenged Snohomish County's adoption of Amended Ordinance No. 15-034, an ordinance which amended portions of the County's critical areas ordinances. The Board concluded that the petitioners failed to meet their burden of proof to establish violations of the Growth Management Act (GMA) other than in a single instance: the failure to consider for designation specific types of critical areas listed in WAC 365-190-130.

I. INTRODUCTION

The Hearing on the Merits was convened on January 17, 2017, at the Tulalip Tribal Center, Snohomish County, Washington. Present at the hearing were Board Members Deb Eddy and William Roehl, with Eddy presiding. Cheryl Pflug participated by telephone. Futurewise and the Pilchuck Audubon Society (Futurewise-Pilchuck) were represented by Tim Trohimovich while Anthony J. Jones represented The Tulalip Tribes (Tulalip). Deputy Prosecuting Attorneys Alethea M. Hart, Jessica Kraft-Klehm, and Laura C. Kisielius represented Snohomish County (County).

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II. BOARD JURISDICTION

The Board finds that the Petitions for Review were timely filed pursuant to RCW 36.70A.290(2)[1], that the Petitioners have standing to appear before the Board pursuant to RCW 36.70A.280(2)[2], and that the Board has jurisdiction over the subject matter of the Petitions for Review pursuant to RCW 36.70A.280(1)(a).

III. BURDEN OF PROOF

Pursuant to RCW 36.70A.320(1), comprehensive plans and development regulations and amendments to them are presumed valid upon adoption.[3] This presumption creates a high threshold for challengers as the burden is on a petitioner to demonstrate the action taken by the local jurisdiction is not in compliance with the Growth Management Act (GMA).[4]

The Board is charged with adjudicating GMA compliance and, when necessary, invalidating noncompliant plans and development regulations.[5] The scope of the Board's review is limited to determining whether a local jurisdiction has achieved compliance with the GMA only with respect to those issues presented in a timely petition for review.[6] The GMA directs that the Board, after full consideration of the petition, shall determine whether there is compliance with the requirements of the GMA.[7] The Board shall find compliance unless it determines the local jurisdiction's action is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA.[8] In order to

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[1] RCW 36.70A.290 (2) All petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter or chapter 90.58 or 43.21C RCW must be filed within sixty days after publication as provided in (a) through (c) of this subsection. Petitions for Review were filed on November 6 and November 23, 2015, following publication of a Notice of adoption of the ordinance on September 23, 2015.
[2] The County did not dispute allegations by the petitioners that they participated orally and in writing.
[3] RCW 36.70A.320(1) provides: "[Except for the shoreline element of a comprehensive plan and applicable development regulations] comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption."
[4] RCW 36.70A.320(2) provides: "[Except when city or county is subject to a Determination of Invalidity] the burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this chapter is not in compliance with the requirements of this chapter."
[5] RCW 36.70A.280, RCW 36.70A.302.
[6] RCW 36.70A.290(1).
[7] RCW 36.70A.320(3).
[8] RCW 36.70A.320(3).

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find the local jurisdiction's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been committed."[9]

Thus, the burden is on the Petitioners to overcome the presumption of validity and demonstrate the challenged action taken by Snohomish County is clearly erroneous in light of the goals and requirements of the GMA.

IV. PRELIMINARY MATTERS

The County objected to the proposed use by Futurewise of a PowerPoint presentation at the Hearing on the Merits, apparently under an impression arising from a poorly worded footnote regarding illustrative exhibits included in the Hearing on the Merits Agenda. That concern was addressed and the Board clarified that the Power Point could be used but only for the purpose of highlighting argument previously briefed. No new argument or evidence would be allowed.

The County's Prehearing Brief included an appendix in which it asserted numerous alleged statutory or rule violations had been abandoned by the parties.[10] Counsel for each of the petitioners acknowledged the accuracy of the County's allegations of abandonment.[11] Interlineations of the issue statements included in this order and on the attached appendix illustrate which statutes and rules were so abandoned.[12]

V. LEGAL ISSUES AND ANALYSIS

The Petitioners challenged the County's adoption of Amended Ordinance No. 15-034 which amended portions of the County's critical areas ordinances, including code sections addressing wetlands, fish and wildlife habitat conservation areas (chapter 30.62A SCC),

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[9] *City of Arlington v. Central Puget Sound Growth Mgmt. Hearings Bd.,* 162 Wn.2d 768, 778, 193 P.3d 1077 (2008) (Citing *Dept. of Ecology v. PUD District No. 1 of Jefferson County,* 121 Wn.2d 179, 201, 849 P.2d 646 1993); *See also Swinomish Tribe v. WWGMHB,* 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007); *Lewis County v. W. Wash. Growth Mgmt. Hearings Bd.,* 157 Wn.2d 488, 497-98, 139 P.3d 1096 (2006).

[10] Snohomish County's Prehearing Brief (December 23, 2016) Appendix "A".

[11] Transcript of Proceedings, Hearing on the Merits at 73-75.

[12] WAC 242-03-590(1) A petitioner, or a moving party when a motion has been filed, shall submit a brief addressing each legal issue it expects the board to determine. Failure by such a party to brief an issue shall constitute abandonment of the unbriefed issue. Briefs shall enumerate and set forth the legal issue(s) as specified in the prehearing order.

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geologically hazardous areas (chapter 30.62B SCC), and critical aquifer recharge areas (chapter 30.62C SCC). At the request of the Board, the Petitioners combined many of their issue statements[13] which were then included in the Board's Prehearing Order of December 18, 2015, and are set forth on the attached Exhibit A.

At the outset, the County argues many of the code sections Petitioners challenge were adopted in 2007[14], were not changed in any substantive manner with the adoption of Amended Ordinance No. 15-034, and the current challenge of those code sections is untimely under RCW 36.70A.290(2).[15] This disagreement between the parties is based on significantly different interpretations of Supreme Court holdings in its *Thurston County v. WWGMHB* decision.[16] The County references that portion of the *Thurston County* decision where the Court stated:

> . . . a party may challenge a County's failure to revise a comprehensive plan only with respect to those provisions that are directly affected by new or recently amended GMA provisions, meaning those provisions related to mandatory elements of a comprehensive plan that have been adopted or substantively amended since the previous comprehensive plan was adopted or updated, following a seven year update.

In this matter, the Petitioners challenge various critical area regulations designed to comply with the requirements of RCW 36.70A.060(2).[17] The County contends several of the Petitioners' issues do not challenge any development regulations affected by new or recently amended legislation.

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[13] Restatement of Tulalip Tribes, Futurewise & Pilchuck Audubon Society Issues (December 16, 2015).
[14] The County previously adopted critical area regulations in 2007, including chapters 30.62A. 30.62B, and 30.62C SCC, with the adoption of Ordinance No. 06-061.
[15] All petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter or chapter 90.58 or 43.21C RCW must be filed within sixty days after publication as provided in (a) through (c) of this subsection.
[16] 164 Wn.2d 329 (2008).
[17] Each county and city shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170.

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Futurewise-Pilchuck, joined by Tulalip, argues the challenges fit within a separate holding in *Thurston County* where the Court allowed a challenge to the sizing of a County's Urban Growth Areas:

> The County fails to recognize the changes to the two individual UGAs modify the overall UGA size and, even if the overall UGA size was not changed, the population projection was updated. In this case, the County's UGA boundaries were amended in 2004 and, consequently, are subject to challenge.[18]

Futurewise-Pilchuck likens Thurston County's UGA amendments to the critical area regulation (CAR) amendments in the present case. The Petitioners seek to expand the Supreme Court's holding to allow challenges to Snohomish County's buffer requirements, arguing various "changes" to buffer requirements are akin to modifications of UGA size.[19] In essence, the argument is that changes such as wetland classifications and resulting buffer width modifications affect the overall ability of regulations to protect the functions and values of critical areas.

Tulalip goes so far as to assert this Board has the jurisdiction to review the challenged ordinance to correct ". . . the perpetuation of errors that were also included in earlier versions County critical area regulations . . . [sic]".[20]

The Board does not agree that the *Thurston County* rationale applies. UGA sizing is based on Office of Financial Management population projections which are regularly updated.[21] Thurston County had revised the size of two municipal UGAs subsequent to such an update. There is a significant difference presented here. There have been no CAR

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[18] 164 Wn.2d 329 at 347 (2008).

[19] Futurewise's and Pilchuck Audubon Society's Prehearing Brief at 4.: "Like the two UGA amendments that modified the overall UGA size in the *Thurston County* decision, these amendments modified the buffer requirements applicable to aquatic critical areas including wetlands. So, following the reasoning in the *Thurston County* decision, the Board has jurisdiction to hear the buffer issues raised in this appeal."

[20] Reply Brief of Petitioner Tulalip Tribes at 3. Yet see *Thurston County v. WWGMHB*., 164 Wn.2d 329, 344-345: "The seven year update does not strip the original comprehensive plan of its legal status as GMA compliant, and we will not presume the legislature intended such a drastic measure in the absence of statutory language to that effect. If the laws have not changed, the comprehensive plan remains GMA compliant."

[21] RCW 36.70A.110.

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provisions (with one possible exception[22]) "directly affected by new or recently amended GMA provisions" brought to the attention of the Board (Emphasis added). In *Thurston County*, UGA sizes had been changed, thus affecting the County's overall ability to accommodate the projected urban growth population.[23] Futurewise-Pilchuck would expand that holding to allow challenges when there have been no new or recent GMA amendments, no substantive, relevant regulatory amendments, and no new best available science.[24] The County clearly articulated the applicable law: ". . . where a regulation is wholly unchanged or is amended in a manner unrelated to the substance of the legal issue . . . and petitioner cites no changed science or GMA mandate, the challenge is time barred."[25]

The preceding quote also referred to "best available science" (BAS). Here, even though the Board rejects Petitioners' interpretation of *Thurston County*, challenges to CAR amendments may be raised if the County failed to consider BAS in substantively amending the CARs.[26] That is, if there has been "new", more recent, science developed applicable to the protection of the functions and values of a particular critical area, an amended CAR would need to reflect consideration of same.[27] As the Board stated in *Postema*: "[a] challenge to unchanged provisions is time-barred except where required by a recent GMA legislative amendment, new population forecast, or changed science concerning protection

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[22] Sections of chapter 365-190 WAC, the Minimum Guidelines to Classify Agriculture, Forest, Mineral Lands and Critical areas, specifically WAC 365-190-090 through WAC 365-190-130, were adopted subsequent to the County's 2007 CAR adoptions, including WAC 365-190-130, addressing fish and wildlife habitat conservation areas.

[23] RCW 36.70A.110 (2).

[24] See *Postema v. Snohomish County*, GMHB No. 15-3-0011 (FDO, April 8, 2016) at 6.
While it may be possible that extensive amendments to CARs would result in an overall failure of a jurisdiction to properly designate and protect the functions and values of critical areas under RCW 36.70A.060, the Petitioners have not shown that Snohomish County's CAR amendments rise to that level.

[25] Transcript of Proceedings Hearing on the Merits at 42, lines 9-14.

[26] RCW 36.70A.172(1) In designating and protecting critical areas under this chapter, counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas. In addition, counties and cities shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.

[27] Tulalip argued that the *Yakima County v. Eastern GMHB* decision, 168 Wash. App. 680, supports its argument that challenges may be raised when there have been no new or recent GMA amendments. That was not the basis for the decision in *Yakima County*. Rather, that decision turned on the fact there had been a new synthesis of BAS reviewed by the County and buffer widths established fell outside the range of BAS widths.

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of critical area functions and values."[28] Consequently, the Board will consider whether the County considered such BAS in the adoption of newly adopted or substantively amended challenged CARs, whether or not the CARs had been affected by new or recently amended GMA (or mandatory WAC) provisions.[29]

Petitioners' "A" Legal Issues:[30]

Issues A-1[31] and A-8[32]

These Issues involve the interrelationship between the County's CAR (chapters 30.62A, 30.62B, and 30.62C SCC) and its Shoreline Management Program (chapter 30.67 SCC). Tulalip argues Issue A-1 addresses an amendment to SCC 30.62A.020 which now provides that wetlands and Fish and Wildlife Habitat Conservation Areas (FWHCAs) within shorelines are subject to regulations in the SMP, chapter 30.67, rather than chapter 30.62A. Tulalip states that the change "inserts ambiguous language", thus it is not clear which chapter applies as chapter 30.62A includes references to regulating activities in or adjacent to "marine waters".

Initially, the Board observes that Tulalip's suggestion that the change "presents numerous potentially, conflicting requirements" regarding development activities within shoreline critical areas is insufficient to carry its burden to establish violations of RCW 36.70A.130 and RCW 36.70A.172.

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[28] *Postema v. Snohomish County*, GMHB No. 15-3-0011 (FDO, April 8, 2016) at 6.
[29] *Id.*
[30] The individual Legal Issues set out in this Final Decision and Order are denoted as "A", "B", or "C". Each set of letter issues is preceded by a paragraph setting forth various GMA requirements allegedly violated. Those paragraphs are included in full on the attached Appendix.
[31] That SCC 30.62A.020 fails to clarify the relationship between the Shoreline Master Program and the critical areas regulations and their applicability to various uses and activities, resulting [in] gaps in protection for critical areas and inconsistencies with Comprehensive Plan Policies. (Tribes Issue 2 and Futurewise Issues 1.2 and 2.3)
[32] That Amended Ordinance No. 15-034 fails to apply the best available science or to provide internally consistent standards between the critical area regulations, the Shoreline Management Program Policies 3.2.5.3, ~~3.2.5.4,~~ 3.2.5.14, and 3.2.5.15, Shoreline Code, SCC 30.67.515, ~~.520, .570,~~ .575 ~~and .599,~~ and Comprehensive Plan policies, as relates to the regulation of bulkheads, piers, and floats, and other activities on shorelines. (Tribes Issue 3).

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Even if that were not the case, the amendment merely serves to clarify that shoreline critical areas are subject to the SMP. When the County last adopted and received DOE approval of its Shoreline Management Program update in 2011, it was required to comply with RCW 36.70A.480. That statute provides, in part, that critical areas within shorelines of the state are protected under chapter 90.58 RCW (the SMA), and are not subject to the requirements of the GMA.[33] Prior to that time, critical areas within the County's shorelines were regulated under its CAR. At the time of the 2011 update, the 2007 version of the CAR was in effect.

The amendment of SCC 30.62A.020 makes it clear that it is the SMP which regulates critical area activities within shoreline jurisdiction.[34] It is true that chapter 30.67 includes references back to regulations set out in chapters 30.602A, 30.602B, and 30.602C. However, SCC 30.67.060(3) provides that if there are conflicts between regulations in those chapters as they relate to shoreline regulations "the more ecologically protective provisions shall apply". Finally, the Board observes that the confusion is primarily due to the fact the GMA required the County to conduct its comprehensive plan review/update in 2016 while its SMP upgrade is not required until 2019. The Board assumes the 2019 SMP update will clarify the applicable regulations and obviously will include review of the SMP regulations so as to meet the requirements of the SMA.

Issue A-8 asserts the ordinance creates internally inconsistent standards between the CAR and various SMP policies[35]. Tulalip points out regulations in chapters 30.67 and 30.62A that establish requirements for various specific shoreline development activities and states these regulations create "inconsistencies and ambiguities", leading to a failure to protect critical areas and a failure to include BAS. However, Tulalip fails to establish just

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[33] RCW 36.70A.480(3)(e).

[34] SCC 30.62A.020 Protection of wetlands and fish and wildlife habitat conservation areas located within shorelines of the state, as defined in chapter 90.58 RCW, shall be accomplished through compliance with the provisions of ((this)) chapter 30.67 SCC. Nothing in this section shall be construed to be inconsistent with RCW 36.70A.480.

[35] SMP Policy 3.2.5.3(1), Policy 3.2.5.15, and Policy 3.2.5.14(3).

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what constitutes those inconsistencies; it merely alleges that critical area regulations in both chapters arguably create "ambiguities" and "potential conflicts".[36]

Tulalip has failed to meet its burden of proof to establish violations of RCW 36.70A.050, RCW 36.70A.060, 36.70A.130, and RCW 36.70A.172 in regards to issues A-1 and A-8.

Issue A-2[37]

With this Issue, Futurewise-Pilchuck argues that certain allowances for buffer reductions, the averaging of buffer widths, and buffers applicable to coastal lagoons set out in SCC 30.62A.320 violate RCW 36.70A.060 and RCW 36.70A.172, the requirements to protect designated critical areas, and to do so while considering BAS.

Futurewise-Pilchuck's argument runs afoul of the holding in *Thurston County* addressed above that a party may only challenge provisions directly affected by new or recently amended GMA provisions. It is clear from a review of SCC 30.62A.320 that Amended Ordinance No. 15-034 did not modify buffer widths. Any challenge to critical area buffer widths should have been brought within sixty days of publication of the 2013 CAR ordinance. That was also the Board's conclusion in an earlier challenge of Amended Ordinance No. 15-034.[38]

In that the buffer widths were not modified, it is incumbent upon Futurewise-Pilchuck to put forth recent BAS dictating buffer width increases. However, the only references to new science regarding buffer widths are included in a 2014 DOE publication. That document specifically includes the following statement:

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[36] Prehearing Brief of Tulalip Tribes at 10 and 26.

[37] A-2: That SCC 30.62A.320 allows critical area buffer reductions up to 50% including the buffer reductions from the “standard buffer width” in Table 2b, exceeding the recommendations of the best available science indicating that buffers should not be reduced by more than 20 to 25%, and creating inconsistencies with Comprehensive Plan policies. (Tribes Issue 4 and Futurewise Issue 1.4)

[38] *Postema v. Snohomish County*, GMHB No. 15-3-0011 (FDO, April 7, 2016) at 8: In any event, objection to buffer widths is untimely. The 2015 CAR made no changes to wetland buffer widths. The only changes to wetland regulations were amendments to the classification scheme to bring the regulations in line with updated Ecology science concerning wetland typology.

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> The guidance presented in Volume 2 is advisory only. Local governments are not required to use this guidance. The guidance in and of itself is not "best available science."[39]

Futurewise-Pilchucks' arguments regarding buffer averaging and buffer reductions are similarly unavailing. The only substantive change to SCC 30.62A.320(1)(f) and (g) added a fencing requirement to qualify for buffer reduction (320(1)(f)) while others were unrelated to the Petitioners' complaints. SCC 30.62A.320(1)(g) merely clarified a reference to the buffer width Tables. There were no other amendments of SCC 30.62A.320(1)(g). The regulation regarding coastal lagoons was amended only to comport with DOE's updated wetland rating system.[40]

No new BAS is presented and, again, DOE found the County's actions were consistent with BAS. DOE's letter of February 23, 2015, observed that the County's basic buffer widths comported with BAS[41], but it had concerns regarding buffer reductions. Subsequently, in its letter of August 6, 2015, DOE stated the prior concerns about buffer reductions, buffer encroachments for single-family residences, and minor development activity exemptions had been addressed.

Futurewise-Pilchuck failed to meet its burden of proof to establish violations of RCW 36.70A.050, RCW 36.70A.060, 36.70A.130, and RCW 36.70A.172 in regards to issues A-2.

Issue A-3[42]

Tulalip states that SCC 30.62A.320(1)(c)(ii), through the addition of the word "new", allows "blanket increases in impervious surfaces adjacent to salmonid habitat". A similar

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[39] IR 3.5.6 (227), Granger, T. et al, at 1-2.

[40] IR 2.6.1.4 at 118: "If a wetland in a coastal lagoon meets all three of the following criteria it is Category I". One of those criteria is that the wetland be larger than 1/10 of an acre.

[41] IR 3.4.2 at 1: "We believe that the basic wetland buffer widths . . . listed in Table 2b are consistent with BAS".

[42] That SCC 30.62A.320(1)(c) and SCC 30.62A.520(4) allow an increase in impervious surfaces within a 300-foot management area next to streams or rivers containing salmonids without regard to the best available science, without giving special consideration to the conservation or protection measures necessary to preserve or enhance anadromous fisheries, and resulting in inconsistencies with Comprehensive Plan policies. (Tribes Issue 6 and Futurewise Issue 1.4)

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change was made to SCC 30.62A.520(4). The former section was amended so that it now reads as follows:

> (c) New effective impervious surface restrictions:
>
> (i) no new effective impervious surfaces are allowed within the buffer of streams, wetlands, lakes or marine waters; and
>
> (ii) total new effective impervious surfaces shall be limited to 10 percent within 300 feet of:
>
> (A) any streams or lakes containing salmonids;
>
> (B) wetlands containing salmonids; or
>
> (C) marine waters containing salmonids.

Tulalip makes numerous references to BAS as it relates to impervious surface and potential resulting negative impacts of increases in same on waters and salmonids. IR 3.1.5(11) clearly supports Tulalip's concerns in regards to increases in impervious surface above 10%. However, the two challenged sections of the County Code as well as Tulalip's argument focus on percentages of imperviousness on specific parcels or projects. That is, the Code applies to development activities, actions requiring project permits, and clearing.[43] The science proffered by the petitioner, IR 3.1.5(11), on the other hand, addresses impervious percentages on a watershed basis. Furthermore, there is no BAS presented relating the 10% figure to distances from salmonid waters.[44] Based on the evidence presented, the Board is unable to relate the BAS 10% watershed limitation to the Code amendments affecting specific development projects.

An additional allegation raised by Tulalip is that the amendments to these two code sections are inconsistent with and fail to implement two comprehensive plan sections: Objective NE 1.C and Policy NE 1.C.2(a). The Petitioner's mere allegation fails to establish such inconsistencies or failures.

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[43] SCC 30.62A.010, 30.62A.320.

[44] The Board observes that no new effective impervious surfaces are allowed within buffers- SCC 30.62A.320(1)(c)(i).

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Finally, as previously referenced, DOE stated in its August 6, 2015, letter that the County had addressed its concerns regarding "buffer encroachments for single-family residences".[45]

Tulalip has failed to meet its burden of proof to establish violations of RCW 36.70A.130 or RCW 36.70A.172 in regards to Issue A-3.

Issue A-4[46]

With this Issue, as with Tulalip's Issue A-3, Futurewise-Pilchuck challenges SCC 30.62A.520, but from a different angle. It argues code section SCC 30.62A.520(2) violates RCW 36.70A.172 (BAS requirement), RCW 36.70A.070 (internal comprehensive plan consistency), and RCW 36.70A.060(2) (critical area protection) as it "allows new single family residential development, expansions of existing single family residences, and ordinary residential improvements on lots existing prior to October 1, 2007 to disturb 4,000 square feet of the buffer".[47]

The Board first observes that SCC 30.62A.520(2)'s 4,000 square foot buffer disturbance allowance is not a new code section.[48] While it was amended by Amended Ordinance 15-034, that change was not of a substantive nature. As such the challenge is time barred absent more recent BAS.

While Futurewise-Pilchuck references exhibits highlighting the importance of buffers it neither provides any references to more recent BAS requiring an amendment nor does it relate the science back to the actual effect of the code section. And, as the County

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[45] IR 3.4.2 at 1.

[46] That SCC 30.62A.520 fails to apply best available science or to give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries, and creates inconsistencies with Comprehensive Plan policies, because it allows a 4000 square foot building a driveway envelope to any applicant within a constrained lot, in a critical area buffer, essentially replacing a case-by-case reasonable use determination necessary to avoid unnecessary impacts to critical areas and their buffers. (Tribes Issue 7 and Futurewise Issue 1.4)

[47] Futurewise's and Pilchuck's Petitioners' Prehearing Brief at 13.

[48] The development (~~New single family residential structures and ordinary residential improvements~~) shall not disturb more than 4,000 square feet of the buffer.

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observes, the petitioner does not acknowledge that SCC 30.62A.520(2) is but one of 12 restrictions placed on buffer disturbance allowance by single-family residential development.

Futurewise-Pilchuck is unable to meet its burden of proof to establish violations of RCW 36.70A.060, RCW 36.70A.130 or RCW 36.70A.172 in regards to Issue A-4.

Issue A-5[49]

This issue involves wetland "mitigation ratios" and the monitoring of the success of mitigation projects. Mitigation itself is a sequence of steps or actions (mitigation sequencing[50]). As the Board understands Issue A-5, it focuses on that step in the mitigation sequence that occurs after avoidance and minimization: compensatory mitigation. It typically includes restoring, creating, enhancing, or preserving wetlands to replace those lost or damaged through permitted activities.[51] Mitigation ratios are the product of the number of square feet or acres required to compensate for the loss or damage to a wetland divided by the acreage of impact.[52] The goal is to achieve no net loss of wetland functions and values.

Tulalip argues that the County has failed to include BAS by setting mitigation ratios "as low as 1:1, when BAS dictates a minimum ratio of 2:1 . . . [and the County] fails to establish adequate monitoring standards to ensure that mitigation projects are properly functioning."[53]

Initially, the Board observes that SCC 30.62A.310 was not amended in any substantive manner. The only applicable amendment of the entire code section was to add the clause "and their buffers" to SCC 30.62A.310(1). That section appears to be a correction or clarification as the section already applied to development activities within

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[49] That SCC 30.62A.150, .310(3)(b)(iii) & .320(3) fail to apply best available science, fail to protect the functions and values of critical areas, and are inconsistent with Comprehensive Plan policies because they allow mitigation ratios as low as 1:1 for replacement of critical areas, and repeal the earlier standard for monitoring mitigation without including a new standard. (Tribes Issue 8 and Futurewise Issues 1.4 and 1.3)

[50] Washington State Department of Ecology, U.S. Army Corps of Engineers Seattle District, and U.S. Environmental Protection Agency Region 10. March 2006. Wetland Mitigation in Washington State –Part 1: Agency Policies and Guidance (Version 1). Washington State Department of Ecology Publication #06-06-011a. Olympia, WA, p. 22.

[51] *Id*. p. ix.

[52] *Id*. p. 67.

[53] Opening Prehearing Brief of Petitioner Tulalip Tribes at 19.

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critical areas and their buffers. See SCC 30.62A.310(2). The challenge is time barred absent more recent BAS which Tulalip did not provide.

Tulalip is correct that some BAS suggests that appropriate ratios should be 2:1 or greater.[54] However, even assuming the challenge was timely and assuming the BAS referenced by Tulalip was recent, the County points out that SCC 30.62A.310(3)(b)(iii) refers to "function replacement": "functions and values shall be replaced at a 1:1 ratio". The goal is to avoid a net negative impact to critical area functions and values as the end result; that is achieved if the functions are replaced at 1:1. Replacement of function in fact comports with BAS.[55] Furthermore, the BAS is not new - it was considered by the County when it adopted the prior version of this section of the Code.

Tulalip also asserts SCC 30.62A.320(3)(d) as well as Table 3 of that section fail "to increase all mitigation ratios to at least 2:1", contrary to BAS. First of all, Table 3 was not amended and no new BAS is cited by Tulalip. SCC 30.62A.320(3)(d) is new and it sets the mitigation ratio for "temporary impacts" at 1:1. Temporary impacts are defined as impacts "that can be restored to pre-disturbance conditions in one growing season". Tulalip takes the position that any mitigation ratio must equal or exceed 2:1. However, the exhibit cited by this petitioner does not mandate a 2:1 ratio; it provides guidance for regulatory agencies.[56] And that publication also suggests it is appropriate to consider the temporary nature of disturbance:

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[54] Sheldon, D., T. Hruby, P. Johnson, K. Harper, A. McMillan, T. Granger, S. Stanley, and E. Stockdale. March 2005. Wetlands in Washington State - Volume 1: A Synthesis of the Science. Washington State Department of Ecology. Publication #05-06-006. Olympia, WA. p. 6-36.

[55] *Id.* "Because of the risk of failure and temporal loss, "replacement ratios greater than 1:1 are used as a means of equalizing the tradeoff. While the goal is always to replace the lost functions at a 1:1 ratio, it is almost always necessary to increase the replacement acreage in order to accomplish this." (Emphasis added)

[56] Washington State Department of Ecology, U.S. Army Corps of Engineers Seattle District, and U.S. Environmental Protection Agency Region 10. March 2006. Wetland Mitigation in Washington State – Part 1: Agency Policies and Guidance (Version 1). Washington State Department of Ecology Publication #06-06-011a. Olympia, WA. At 72: The mitigation ratios provided in this section are guidance. The ratios provided as guidance in this document represent what a permit applicant should expect as requirements for compensation, thereby providing some predictability for applicants. However, regulatory agencies may deviate from the guidance. They must make an individual determination on the mitigation ratios required for specific wetland impacts to ensure that the compensation is proportionate to the proposed loss or degradation of wetland area and/or functions.

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> In some cases a wetland may only be temporarily disturbed . . . For example, when a new pipeline crosses through a wetland the vegetation, soil, and hydro period are usually only temporarily altered. Impacts that are relatively short in duration generally require lower mitigation ratios than permanent impacts.[57]

Finally, Tulalip challenges the County's system for monitoring the success of compensatory mitigation, alleging SCC 30.62A.150(1)(e) provides for monitoring periods of insufficient duration. It refers to correspondence from DOE recommending specific monitoring periods of 5 and 10 years.[58] While Tulalip is correct in its observation that the County did not include those specific recommended monitoring periods, the County did amend SCC 30.62A.150(1)(e) in response to DOE. SCC 30.62A.150 requires the submission of a mitigation plan addressing anticipated impacts to specified critical areas or their buffers. The plan must include, among other requirements, provisions for monitoring, maintenance of the area on a long-term basis to determine whether mitigation was successful and that the mitigation measures in the plan will be sustainable after the monitoring period has expired. (The underlined appears to have been added in response to DOE's comment.)

Based on the evidence submitted by the parties and the specific language of SCC 30.62A.150, the Board cannot conclude that Tulalip has met its burden of proof to establish violations of RCW 36.70A.060(2), RCW 36.70A.130 or RCW 36.70A.172 in regards to Issue A-5.

Issue A-6[59]

This Issue is similar to some of the other issues raised by the parties. SCC 30.62A.340(1) was not amended by Amended Ordinance No. 15-034 other than to change a reference from "Natural Heritage wetlands" to "wetlands listed by the Washington Natural Heritage Program as having High Conservation Value". A challenge of any portion of that

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[57] *Id*. at 69.

[58] IR 2.2.1.68, letter of February 23, 2015, addressed to Snohomish County Planning Commission, at 2.

[59] SCC 30.62A.340(1) fails to apply the best available science or provide consistent standards in relation to the Stormwater Code and Comprehensive Plan policies because it protects only Category I bogs from stormwater discharges. (Tribes Issue 9 and Futurewise Issue 1.4)

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code section should have been brought within sixty days of publication of the earlier CAR ordinance which adopted the language, Ord. 06-061. Nor does Futurewise-Pilchuck submit any recent BAS requiring amendments of this code section. The Board also observes that Futurewise-Pilchuck argues alleged violations involving the filling of wetlands, septic systems, and impervious surfaces within buffers under this Issue. The Issue statement alleged violations in regards to stormwater discharges; any additional argument exceeds the scope of the Issue statement.

Futurewise-Pilchuck is unable to meet its burden of proof to establish violations of RCW 36.70A.060, RCW 36.70A.130 or RCW 36.70A.172 in regards to Issue A-6.

Issue A-7[60]

This issue statement alleges violations of RCW 36.70A.170, the requirement to designate critical areas; RCW 36.70A.172, requiring the inclusion of BAS; RCW 36.70A.060(2), the mandate to adopt regulations protecting designated critical areas; RCW 36.70A.130(1)(d), requiring regulations to be consistent with and implement the plan, and; WAC 365-190-130, one of the Minimum Guidelines adopted by the Department of Commerce to classify natural resource lands and critical areas.[61] Specifically, Tulalip argues the County did not designate three separate types of critical areas referenced in WAC 365-190-130:

- Naturally occurring ponds under twenty acres and their submerged aquatic beds that provide fish or wildlife habitat;

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[60] That SCC 30.62A.010(1) fails to apply the best available science and WAC 365-190-130, and creates inconsistencies with Comprehensive Plan Policies, because it fails to include an updated list of critical area designations. (Tribes Issue 1).

[61] RCW 36.70A.050.
(1) Subject to the definitions provided in RCW 36.70A.030, the department shall adopt guidelines, under chapter 34.05 RCW. . . to guide the classification of: . . . (d) critical areas. . . .
(3) The guidelines under subsection (1) of this section shall be minimum guidelines that apply to all jurisdictions, but also shall allow for regional differences that exist in Washington state. The intent of these guidelines is to assist counties and cities in designating the classification of agricultural lands, forestlands, mineral resource lands, and critical areas under RCW 36.70A.170.

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- Lakes, ponds, streams, and rivers planted with game fish by a governmental or tribal entity; and
- State natural area preserves, natural resource conservation areas, and state wildlife areas.[62]

WAC 365-190-130(2) directs jurisdictions to consider all three of those types of fish and wildlife habitat conservation areas for classification and designation.[63]

The County states it reviewed the Minimum Guidelines, but elected to make no changes. It suggests that Tulalip fails to explain why the failure to name the FWHCAs results in a failure to protect them. It states that other FWHCAs designated by the County Code encompass two of the three categories, and finally, that the third category, (natural area preserves, conservation areas, and state wildlife areas) are "adequately protected".[64]

In earlier Central Board decisions, the Minimum Guidelines were referred to either as mandatory[65] or advisory[66]. More recently, the Central Board acknowledged the appellate courts have clarified that the Guidelines must be followed.[67] See *Manke Lumber Company v. Diehl*[68] and *Lewis County v. Hearings Board*[69].

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[62] 365-190-130(e), (g), and (h).

[63] Fish and wildlife habitat conservation areas that must be considered for classification and designation include:

(a) Areas where endangered, threatened, and sensitive species have a primary association;
(b) Habitats and species of local importance, as determined locally;
(c) Commercial and recreational shellfish areas;
(d) Kelp and eelgrass beds; herring, smelt, and other forage fish spawning areas;
(e) Naturally occurring ponds under twenty acres and their submerged aquatic beds that provide fish or wildlife habitat;
(f) Waters of the state;
(g) Lakes, ponds, streams, and rivers planted with game fish by a governmental or tribal entity; and
(h) State natural area preserves, natural resource conservation areas, and state wildlife areas. (Emphasis added)

[64] Snohomish County's Prehearing Brief at 25.

[65] *DOE/CTED v. City of Kent*, CPSGMHB No. 05-3-0034 (FDO, April 19, 2006) at 10-11 and 26.

[66] *Orton Farms, et al. v. Pierce County*, CPSGMHB No. 04-3-0007c (FDO, August 2, 2004) at 26.

[67] GMHB No. 12-3-0002c (FDO, July. 9, 2012) at 31.

[68] 91 Wn. App. 793, 807 (1998).

[69] 157 Wn.2d 488, 501 (2006).

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As Tulalip points out, WAC 365-190-130 was promulgated subsequent to the County's prior CAR[70], it includes a directive, and provides in relevant part: (Emphasis added)

> (2) Fish and wildlife habitat conservation areas that must be considered for classification and designation include:
> (e) Naturally occurring ponds under twenty acres and their submerged aquatic beds that provide fish or wildlife habitat;
> (g) Lakes, ponds, streams, and rivers planted with game fish by a governmental or tribal entity; and
> (h) State natural area preserves, natural resource conservation areas, and state wildlife areas.

While the County states it reviewed the Minimum Guidelines, it did not follow them. In fact, the Record reflects the decision to not designate the three categories of FWHCAs was based on an assumption.[71] That assumption is one not supported by the Record. As the Board stated in *WEAN v. Island County*, reliance on the fact that a FWHCA required to be classified and designated is owned and/or managed by another entity or protected by other programs is insufficient. "It is the County's obligation to designate and protect habitat areas and ecosystems; the protection afforded by other entities or regulations is irrelevant."[72]

This Petitioner also raises an allegation of a RCW 36.70A.130(1)(d) violation. However, the argument in support constitutes mere allegations and will be deemed abandoned.

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[70] Transcript of Proceedings, Hearing on the Merits at 16, lines 9-15.

[71] IR 3.1.4 at 3: "F&WHCAs are broadly defined in SCC 30.91C.340 and generally captures all of the F&WHCAs listed in WAC 365-190-130 except for one, 'State natural area preserves, natural resource conservation areas, and state wildlife areas'. The reason for not listing these is based on an assumption that most preserves or conservation areas are already protected. Also, any preserves or conservation areas that are located in or adjacent to any aquatic critical areas, e. g., wetlands, streams, lakes or marine shoreline areas, are already protected by the existing code."

[72] *WEAN v. Island County*, GMHB No. 14-2-0008 (FDO, June 24, 2015) at 31. See Ferry County v. GMHB, 184 Wn. App. 685, 741 (2014): "Ferry County next argues it departed from science because wetland and riparian regulations and buffers already protect 11 species on the DFW list. But as Futurewise-Pilchuck argues, protection by other regulations is irrelevant. Otherwise the GMA's critical habitat provisions are superfluous since state and federal rules already seek to protect ETS species. More importantly, nothing in the record supports the county's assertion. There is no evidence that the county analyzed regulations and determined existing regulations were sufficient to protect these 11 species."

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Tulalip has met its burden of proof to establish violations of RCW 36.70A.170(1)(d), RCW 36.70A.172, RCW 36.70A.060(2), and WAC 365-190-130 in regards to Issue A-7.

Issue A-9[73]

Tulalip argues that amendments of SCC 30.62A.160(3) fail to include BAS. The section was amended as follows:

> Separate tracts and easements. Wetlands, fish and wildlife habitat conservation areas, and buffers shall only be located in <u>easements or</u> in separate tracts <u>or other protected open spaces</u> owned in common by all owners of the lots or parcels within any land division or land use permit or decision regulated pursuant to chapters 30.41A, 30.41B, 30.41C and 30.41D SCC((~~. Provided that in urban growth areas, wetlands, fish and wildlife habitat conservation areas and buffers may be contained in an easement on individual lots or parcels in a form approved by the department.~~)) <u>or any other multi-family project approval with protected open space owned in common.</u>

Tulalip cites BAS that it contends indicates that buffers are not maintained and consequently do not remain effective after transfer of ownership and control to individual property owners. It argues allowing critical area buffers to be located in easements and other protected open space does not comport with BAS and fails to protect critical area functions and values.

However, the Board observes that prior to the amendment of SCC 30.62A.160(3) that section contemplated private, in-common ownership of wetlands, FWHCAs, and their buffers following development. The code section amendment merely extended the application from “land divisions” so as to include “other multi-family project approval with protected open space owned in common”. Furthermore, as the County points out, the BAS cited does not support Tulalip’s contention. IR 3.7.2(1257) at page 5-29 refers to the problems resulting from subdividing of buffers into “multiple private ownerships”. SCC 30.62A.160(3) contemplates ownership in common, not multiple private ownership. IR 3.7.2(1257) at page 113 merely states that "… A buffer regulated during land development

[73] That SCC 30.62A.160 fails to apply the best available science and is inconsistent with Comprehensive Plan policies because it allows for the protection of critical areas and buffers in easements, rather than separate tracts.(Tribes Issue 5)

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may not persist unaltered over time, especially once individual property owners take on the 'oversight' role from the original permitting authority." Finally, this code section specifically requires the installation of fencing, a factor not referenced in the cited BAS.[74]

Tulalip also raises an allegation of a RCW 36.70A.130(1)(d) violation. However, the argument in support constitutes mere allegations and will be deemed abandoned.

Tulalip is unable to meet its burden of proof to establish violations of RCW 36.70A.172 in regards to Issue A-9.

Issue A-10[75]

With this issue, Tulalip raises a concern about how the definition of "buffer" might be interpreted by the County. The definition in SCC 30.91B.190 is: "Buffer" means an area adjacent to a critical area consisting of naturally occurring or re-established vegetation and having a width adequate to protect the critical area. The objection is based on a possible interpretation that would conclude only vegetated areas could constitute buffers.

The County observes that the definition was not amended. In any event, the definition is consistent with BAS.[76]

Tulalip is unable to meet its burden of proof to establish violations of RCW 36.70A.060(2), RCW 36.70A.130(1)(d), or RCW 36.70A.172 in regards to Issue A-10.

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[74] SCC 30.62A.160(5).

[75] That SCC 30.91B.190 fails to apply the best available science and is inconsistent with Comprehensive Plan policies by failing to update or clarify the definition of a "buffer" as pertains to critical areas, because the county's interpretation of this definition excludes critical area protection in areas that have already been impacted such that naturally occurring or re-established vegetation are absent.(Tribes Issue 10)

[76] Sheldon, D., T. Hruby, P. Johnson, K. Harper, A. McMillan, T. Granger, S. Stanley, and E. Stockdale. March 2005. Wetlands in Washington State - Volume 1: A Synthesis of the Science. Washington State Department of Ecology. Publication #05-06-006. Olympia, WA. The Glossary to this publication includes the following definition: Buffers or buffer areas. Vegetated areas adjacent to wetlands, or other aquatic resources, that can reduce impacts from adjacent land uses through various physical, chemical, and/or biological processes.

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Petitioners' "B" Legal Issues:

Issue B-1[77]

Futurewise-Pilchuck alleges that SCC 30.62A.010, SCC 30.62A.130, and SCC 30.62A.140 apply the CARs to development activities, actions requiring project permits, and clearing. "Development activity" is defined to include "construction, development, earth movement, clearing, or other site disturbance which either requires a permit, approval or authorization from the county or is proposed by a public agency".[78] The Petitioners then state that the draining of wetlands, streams, or other critical areas is not encompassed within the definition and those activities are therefore not subject to the CAR.[79] Futurewise-Pilchuck then cites IR 1.3.4.45e which references the 1999 draining of wetlands and resulting flood damage in the County. It also addresses landslides at considerable length, including the horrific slide at Oso, and its resulting damage.

Futurewise-Pilchuck's first fatal flaw is that none of those Code sections was amended in any relevant, substantive manner and challenges are thus time barred. Its second fatal flaw is that the argument regarding the draining of wetlands under Issue B-1 at no point relates the County Code amendments to any specific GMA statute. Its sole reference to GMA requirements is in a footnote in the Issue B-1 section of its brief addressing landslide concerns. The Petitioners merely allege that "Draining eliminates wetland functions and values" and that "Wetlands have been drained in Snohomish County under its critical areas regulations".[80] "An issue is briefed when legal argument is provided."[81] It is not enough to simply cite the statutory provision in the statement of the Legal Issue.[82]

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[77] That SCC 30.62A.010, SCC 30.62A.130, and SCC 30.62A.140 fail to apply the wetland and fish and wildlife habitat conservation regulations to all forms of development that can damage these habitats, fail to require the identification of all critical areas that can harm people and property, fail to protect the functions and values of critical areas, and are not based on best available science. (Futurewise Issue 1.1)

[78] SCC 30.91D.240.

[79] Futurewise's and Pilchuck's Petitioners' Prehearing Brief at 16.

[80] *Id.*

[81] *Tulalip Tribes of Washington v Snohomish County*, CPSGMHB No. 96-3-0029 (FDO, January 8, 1997) at 7.

[82] *TS Holdings v. Pierce County*, GMHB No. 08-3-0001 (FDO, September 2, 2008), at 7(dismissing challenges based on GMA provisions only cited by Petitioner in restating the Legal Issues in the case).

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The Board finds and concludes that the portion of Issue B-1 focused on the draining of wetlands has been abandoned.

Within its argument under Issue B-1, Futurewise-Pilchuck also alleges the County's action in adopting SCC 30.62A.130(1)(g) fails to "adopt development regulations that adequately protect development from …" geologically hazardous areas including landslide hazards and to assure that any allowed development "does not result in harm to other properties", quoting from a 1996 Central GMHB decision, *Pilchuck, et al. v. Snohomish County (Pilchuck II)* [83] It also cites RCW 36.70A.060(2), RCW 36.70A.170(1)(d), and RCW 36.70A.172(1).

SCC 30.62A.130 requires a project permit applicant to submit a "site development plan". Included in that plan under SCC 30.62A.130(1)(g) is the location and description of certain types of critical areas, including landslide hazard areas. Landslide hazard areas are defined to not only include the potential slide area itself but also "buffer" areas.[84] That Code section was amended with the adoption of Ordinance 15-034 by increasing the distance of such areas required to be included in the site development plan from 200 to 300 feet. The essence of Futurewise-Pilchucks' argument is that the GMA requires jurisdictions to adopt development regulations that protect people and development from landslide hazard critical areas and that limiting the identification of landslide areas only to those within 300 feet (plus the applicable buffer area) of a proposed development activity fails to protect people and property. Futurewise-Pilchuck references studies that indicate people have been killed and injured and property has been destroyed at far greater distances from landslide hazard areas than 300 feet.

Jurisdictions are required to <u>designate critical areas</u> (RCW 36.70A.170)[85], to then adopt development regulations that <u>protect designated critical areas</u> (RCW 36.70A.060(2),

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[83] *Pilchuck, et al. v. Snohomish County (Pilchuck II)*, CPSGMHB No. 95-3-0047c (Order Partially Granting Motions for Reconsideration and Clarification, January 25, 1996) at 7, 8.

[84] SCC 30.91L.040(3) " . . . the landslide hazard area also includes lands within a distance from the top of the slope equal to the height of the slope or within a distance of the toe of the slope equal to two times the height of the slope. The director may expand the boundary of a landslide hazard area pursuant to 30.62B.390 SCC.

[85] There is no disagreement with the fact the County has designated landslide hazard areas.

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and in doing so are required to "include the best available science in developing policies and development regulations to protect the functions and values of critical areas" (RCW 36.70A.172(1)). (Emphasis added).

Geologically hazardous areas are defined as "areas that because of their susceptibility to erosion, sliding, earthquake, or other geological events, are not suited to the siting of commercial, residential, or industrial development consistent with public health or safety concerns". RCW 36.70A.030(9). The question presented is whether the GMA requires jurisdictions to protect people and property on the land in addition to protecting the designated critical areas? That question has been previously addressed by the Board. We agree with the Central Board's decision in *Sno-King Environmental Alliance v. Snohomish County* where the Board concluded the GMA does not include a mandate to protect people and development from critical areas:

> The County's duty and obligation to protect the public from potential injury or damage that may occur if development is permitted in geologically hazardous areas is not rooted in the challenged GMA critical areas provisions.[86]

The 1996 *Pilchuck II* quote set out above and cited by Futurewise-Pilchuck in support of its proposition that the GMA mandates the protection of people and development from landslides was dicta. The issue addressed by the Board in *Pilchuck II* was reconsideration of a paragraph in its FDO that listed various provisions of a critical areas ordinance exempting or excluding lands from critical area designation, not protection of critical areas. The issue involved the criteria for designation of areas as landslide hazard areas, specifically the use of a bright line rule of slope percentage without taking into account other factors. The dicta involved protection, not the issue of critical area designation.

The Central Board added:

> [T]he fact that geologically hazardous areas must be designated, coupled with the phrase in the Act's definition of these areas ("... are not suited to the siting of commercial, residential or industrial development...") does not constitute an absolute prohibition of development in these areas. Instead, the Board

[86] *Sno-King Environmental Alliance, et al. v. Snohomish County, et al.,* GMHB No. 06-3-0005 (FDO, July 24, 2006) at 15.

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> interprets this definition as requiring local jurisdictions to adopt development regulations that adequately protect development from these areas.[87]

It also stated:

> However, it is worth repeating that the County retains full discretion in what methods it utilizes and what degree of protection it affords designated landslide hazard areas. Less susceptible lands can be treated differently than more susceptible lands and the nature of the development can be taken into account.[88]

Public health and safety concerns lie within the purview of the County's legislative authority. Here, Snohomish County exercised its discretion. It adopted landslide hazard area regulations by which it sought to balance the protection of people and property with restrictions on the use of land. That is the type of balancing referenced by the Court in *HEAL* where it addressed the balancing of the GMA's goals.[89]

The Board finds and concludes that Futurewise-Pilchuck failed to meet its burden to establish violations of RCW 36.70A.060(2), RCW 36.70A.170(1)(d), and RCW 36.70A.172(1) under that portion of Issue B-1 focused on landslide hazard areas.

Issue B-2[90]

Issue B-2 cites 14 separate County Code sections which Futurewise-Pilchuck contends fail to protect the functions and values of critical areas and fail to include BAS. Of those Futurewise-Pilchuck agreed it had abandoned SCC 30.63A.200[91] and it failed to

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[87] *Pilchuck, et al. v. Snohomish County, CPS*GMHB No 95-3-0047c (Order Partially Granting Motions for Reconsideration and Clarification, January 25, 1996) at 7.

[88] *Id.* at 10.

[89] *HEAL v. Growth Mgmnt Hearings Bd*., 96 Wn. App. 522, 527-534 (1999). Contrary to Futurewise-Pilchuck's contention, *HEAL* did not hold that jurisdictions are required to adopt regulations to protect people/property from landslide hazard areas. It primarily addressed the RCW 36.70A.172(1) requirement to include BAS in the process of crafting regulations to protect critical areas themselves. As to protection, the Court stated: "The policies at issue here deal with critical areas, which are deemed 'critical' because they may be more susceptible to damage from development." (Emphasis added) *HEAL* at 533.

[90] That the buffers, uses, activities, impervious surfaces, and mitigation allowed by SCC 30.63A.160, ~~SCC 30.63A.200,~~ SCC 30.62A.310, SCC 30.62A.320, SCC 30.62A.340, SCC 30.62A.350, SCC 30.62A.520, SCC 30.62A.550, SCC 30.62A.620, SCC 30.62A.630, SCC 30.62A.640, SCC 30.62B.330, SCC 30.62B.530, and SCC 30.91B.190 fail to protect the functions and values of critical areas and are not based on best available science. (Futurewise Issue 1.4)

[91] Transcript of Proceedings, Hearing on the Merits at 73-75.

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reference SCC 30.63A.160 in its opening brief regarding Issue B-2. In addition, it alleged various unamended code sections violated the GMA, as well as sections that were amended in an unrelated or in a non-substantive manner. No recent legislation or recent BAS was submitted which would dictate that those sections are subject to challenge.

The following will be deemed abandoned: Allegations regarding SCC 30.63A.200 and SCC 30.63A.160.

The following will be deemed time barred:

- SCC 30.62A.630 and SCC 30.62B.530: Neither of these sections was amended in any substantive manner and no recent BAS was provided which would support a requirement for amendment. The only Exhibit cited constituting BAS was from 2005.[92]
- SCC 30.62B.330: The section was not amended in any relevant manner.
- SCC 30.62A.350: The only amendment of this section was the deletion of a single sentence unrelated to petitioners' challenge. Petitioners' allegation regarding DOE concerns is controverted by the later DOE letter of August 6, 2015.[93]

SCC 30.91B.190 is a definition previously found to comport with the DOE's definition of "buffer". See Issue A-10 above.

SCC 30.62A.550 establishes the potential for the County to adopt an in-lieu mitigation fee program. Futurewise-Pilchucks' assertion that DOE objected to the final version of the proposal is without merit. It is apparent that the County amended an earlier version of that code section which had been reviewed by and commented upon by DOE.[94] The adopted version provides that if any such program were to be adopted, it would be in accord with DOE's "Guidance on In-Lieu Fee Mitigation".[95] The Petitioner also fails to acknowledge DOE's letter of August 6, 2015, which appears to conclude that the agencies' concerns had been addressed.[96]

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[92] IRE 3.5.6(227) T. Granger, T. Hruby, A. McMillan, D. Peters, J. Rubey, D. Sheldon, S. Stanley, E. Stockdale, *Wetlands in Washington State - Volume 2: Guidance for Protecting and Managing Wetlands* p. 8-14 (Washington State Department of Ecology, Olympia, WA: April 2005, Publication #05-06-008).
[93] IR 3.4.2.
[94] IR 3.5.2 at 9, 10.
[95] SCC 30.62A.550(4)(b).
[96] IR 3.4.2.

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SCC 30.62A.640 and SCC 30.62B.530 are new sections adopted by the County. Also, while SCC 30.62A.620 was not amended in any substantive manner, that section needs to be considered in conjunction with the other two sections as it establishes alternative methods for agricultural activities to comply with the CAR. Normal agricultural activities[97] are deemed to be in compliance with the CARs when they are performed in accordance with one of the following:

1. Best management practices contained in the latest edition of the USDA Natural Resources Conservation Service Field Office Technical Guide;

2. Other recognized best management practices for such activity that protect the functions and values of critical areas, where the NRCS Field Office Technical Guide fails to provide specific guidance or a BMP; or

3. A farm conservation plan that includes provisions addressing critical areas protections specific to the farm site recommended by the end RCS or the Snohomish conservation District and approved by the County.[98]

SCC 30.62A.640 then establishes the requirements for farm conservation plans referenced in paragraph 3 above.

Futurewise-Pilchuck claims that SCC 30.62A.640 does not require farm plans to include protection of critical aquifer recharge areas (CARAs) in violation of RCW 36.70A.060(2) and 36.70A.030(5)(b), citing evidence of groundwater pollution in the County.[99]

However, CARAs are one type of critical area.[100] SCC 30.62A.620(3) states that a farm conservation plan must include "provisions addressing critical areas protection specific to the farm site". As the County points out, chapter 30.62C SCC includes regulations to protect CARAs and SCC 30.62C.010(2)(b) states that the chapter applies to agricultural activities when CARAs are present.

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[97] As defined in the Snohomish County Code.
[98] SCC 30.62A.620.
[99] Futurewise and Pilchuck's Prehearing Brief at 23.
[100] RCW 36.70A.030(5).

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Futurewise-Pilchucks' brief addressing alleged violations related to SCC 30.62A.310 under Issue B-2 refers to its argument in Section IIIB 1. However, Section IIIB 1 fails to refer to SCC 30.62A.310.

Futurewise-Pilchuck also alleges violations related to SCC 30.62A.320 and refers to its argument in its brief at Section IIIA 2. The Board determined Futurewise-Pilchuck had failed to meet its burden of proof under Issue A-2 to establish violations related to the BAS requirements of RCW 36.70A.172 or the requirements in RCW 36.70A.060(2) to protect critical areas and the argument similarly fails under Issue B-2.

Similarly, it alleges violations related to SCC 30.62A.340 and refers to its argument in its brief at Section IIIA 6. The Board determined Futurewise-Pilchuck had failed to meet its burden of proof under Issue A-6 to establish violations related to the BAS requirements of RCW 36.70A.172 and the argument also fails under Issue B-2.

The final code section alleged to constitute a GMA violation under Issue B-2 is SCC 30.62A.520 and the petitioner refers to the argument at Section IIIA 3[101] & IIIA 4 of its brief. The Board determined Tulalip and Futurewise-Pilchuck had failed to meet their burdens of proof to establish violations in regards to SCC 30.62A.520 under either Issue A-3 or A-4.

Futurewise-Pilchuck failed to meet its burden of proof to establish violations under Issue B-2.

Issue B-3[102]

Chapter 30.62B SCC is the County's CAR section applicable to geologically hazardous areas while chapter 30.62C SCC applies to CARAs. Code sections SCC 30.62B.520, SCC 30.62B.530, SCC 30.62B.540 relate to farm plans for agricultural activities within geologically hazardous areas. The Board addressed Futurewise-Pilchucks'

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[101] Section IIIA 3 incorporated the argument of Tulalip.

[102] That the uses, activities, impervious surfaces, development, and surface diversions and ground water withdrawals allowed by ~~SCC 30.62B.520, SCC 30.62B.530,~~ SCC 30.62B.540, ~~SCC 30.62C.010,~~ SCC 30.62C.130, SCC 30.62C.140, ~~and SCC 30.62C.340~~ fail to protect the functions and values of critical areas including critical aquifer recharge areas and surface and ground water and are not based on best available science. Futurewise Issue 1.5)

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argument regarding farm plans above and found and concluded the petitioners had failed to meet their burden of proof to establish the farm plan provisions violated the GMA.[103]

Issue B-3 also alleges violations arising from SCC 30.62C.010, SCC 30.62C.130, SCC 30.62C.140, and SCC 30.62C.340. It bases its argument on recent Supreme Court and GMHB decisions regarding the need for jurisdictions to insure water is legally and actually available to support development activity.[104] The allegation is that the County has failed to incorporate into chapter 30.62C the requirements to establish that water supplies are legally and actually available as interpreted by the Supreme Court and the Board thus violating RCW 36.70A.172 and RCW 36.70A.060(2).

SCC 30.62C.140 addresses "Hydrogeologic Reports" which the County requires for proposed activities within sole source aquifers, Group A wellhead protection areas, or CARAs with high to moderate groundwater sensitivity. Included in the Report requirements of SCC 30.62C.140 is a discussion of the effects of the proposed activity on groundwater quality and quantity (SCC 30.62C.140(3)(f)). That section was amended by Amended Ordinance 15-034 to include discussion of the recharge potential of the site as well as, if water use is proposed, a description of a water source or confirmation of availability of water from an approved water purveyor.

The Board agrees with the County's position. While local jurisdictions are now required to address both the legal and actual availability of water for development activity, inclusion of such a requirement within the hydrogeologic report section of the Snohomish County Code protecting CARAs makes little sense. The goal of the requirements of chapter 30.62C is to designate and protect CARAs, their water quality and quantity, not to address the availability of water for development activity.

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[103] As noted previously, the farm plan provisions in chapters 30.62A SCC and 30.62B SCC are the same.
[104] *Kittitas County v. Eastern Washington Growth Management Hearings Bd.*, 172 Wn.2d 144 (2011); *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68 (2000); *Hirst. v. Whatcom County*, GMHB No. 12-2-0013 (FDO, June 7, 2013) affirmed *Whatcom Cty. v. Hirst*, 186 Wn.2d 648, (2016).

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Futurewise-Pilchuck failed to meet its burden of proof to establish GMA violations under Issue B-3 in regards to SCC 30.62B.520, SCC 30.62B.530, SCC 30.62B.540 which relate to farm plans for agricultural activities within geologically hazardous areas.

Futurewise-Pilchuck failed to meet its burden of proof to establish violations under Issue B-3 in regards to SCC 30.62C.010, SCC 30.62C.130, SCC 30.62C.140, and SCC 30.62C.340 which relate to the protection of CARAs.

Petitioners' "C" Legal Issues:

Issue C-1[105]

Issues C-1 and C-2 both involve geologically hazardous areas. Futurewise-Pilchuck focuses on the potential for significant loss of life and injury as well as property damage resulting from future landslides. It sets forth numerous regulations included within chapter 30.62B SCC (the County's regulations regarding geologically hazardous areas) that it argues violate the GMA. With Issue C-1, the petitioners' exhibits document the scale of the recent, tragic Oso landslide and also the potential for extreme slide "run-out" distances. For example, the Oso slide had a run-out of over 1 mile.

A recent study of Western Washington slides found average run-outs of nearly 200 feet with a maximum of 771 feet. Futurewise-Pilchuck may well be correct when it states the regulations included in Ordinance 15-034 will not prevent another Oso tragedy. In fact, the County acknowledges that its regulations are not likely to "capture extreme events like Oso".[106] But the Board does not reach the issue of whether or not critical area regulations must be crafted in a manner designed to prevent similar tragedies under this issue.

Here, Futurewise-Pilchuck failed to cite any GMA requirement supposedly violated by the County's geologically hazardous area regulations listed in Issue C-1. It is

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[105] That SCC 30.62B.010, SCC 30.62B.130, SCC 30.62B.140, SCC 30.62B.160, ~~SCC 30.62B.210,~~ SCC 30.62B.320, SCC 30.62B.340, and SCC 30.91L.040 fail to apply the geologically hazardous regulations to all forms of development that can damage these areas or be damaged by them, fail to designate and require the identification of all critical areas that can harm people and property, fail to protect people and property from these natural hazards, and the regulations are not based on best available science. (Futurewise Issue 2.1)

[106] Snohomish County's Prehearing Brief at 46.

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incumbent upon a petitioner to relate an adopted regulation to a specific GMA statute/requirement and provide argument establishing that the provision violates the statute/requirement. That was not done here. Rather, the petitioners' brief includes statements such as the regulation ". . . fails to protect development from landslides as the GMA commands"[107], ". . . these sections violate the GMA for the same reasons . . ."[108], and "are not supported by the scientific evidence"[109].

Issue C-1 has been abandoned.

Futurewise-Pilchuck failed to meet its burden of proof to establish violations of the GMA in regards to Issue C-1.

Issue C-2[110]

SCC 30.62B.390 authorizes the County Planning and Development Services Director to expand geologically hazardous area boundaries, impose additional standards/requirements beyond those set out in chapter 30.62B SCC, or to impose mitigation requirements if, in the director's opinion, the same are required to protect public health, safety, and welfare, or to mitigate significant adverse impacts from development activity. Futurewise-Pilchuck argues that the discretion granted to the Director somehow conflicts with the County's RCW 36.70A.170(1) requirement to "designate" critical areas. It is apparent that the County has designated its geologically hazardous areas. SCC 30.62B.390 merely provides discretion to *expand* those areas where it is deemed appropriate. Futurewise-Pilchuck also suggests the code section violates RCW 36.70A.060(2)'s requirement to "protect" designated critical areas, including geologically hazardous areas, suggesting that the requirement to "protect " such designated critical areas incorporates a duty to "protect the health or welfare".[111] That is simply contrary to the

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[107] Futurewise's and Pilchuck's Prehearing Brief at 33.
[108] *Id.* at 31 and 32.
[109] *Id.* at 33.
[110] The designation of landslide hazards and the protections authorized by SCC 30.62B.390 are discretionary, lack sufficient standards, and fail to protect people and property from landslide hazards, and are not based on best available science. (Futurewise Issue 2.2)
[111] Brief at 35.

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plain wording of RCW 36.70A.060(2) which requires the adoption of regulations that protect designated critical areas.

Futurewise-Pilchuck failed to meet its burden of proof to establish violations of the GMA in regards to Issue C-2.

VI. ORDER

Based upon review of the Petitions for Review the briefs and exhibits submitted by the parties, the GMA, case law and prior Board orders, having considered the arguments of the parties, and having deliberated on the matter, the Board Orders as follows:

1. Snohomish County failed to include and consider certain requirements related to the designation and protection of critical areas as set forth in this order in violation of RCW 36.70A.170, RCW 36.70A.060 and WAC 365-190-130 under Issue A-7;

2. All other issues raised by Futurewise, Pilchuck Audubon Society, and The Tulalip Tribes are dismissed;

3. The Board remands Ordinance No. 15-034 for compliance, as set forth in this order;

4. The Board sets the following schedule for the County's compliance:

Item	Date Due
Status Report on Compliance Due	August 7, 2017
Compliance Due	August 21, 2017
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	September 5, 2017
Objections to a Finding of Compliance	September 19, 2017
Response to Objections	September 29, 2017
Telephonic Compliance Hearing 1 (800) 704-9804 and use pin code 4472777#	**October 5, 2017** **10:00 AM**

DATED this 17th day of February, 2017

_____
William Roehl, Board Member

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_____
Deb Eddy, Board Member

Concurrence of Cheryl Pflug

I concur in the majority decision but write separately to distinguish my reasons for concurring as to Issue C1 regarding landslide hazards, particularly regarding the question of whether the GMA imposes a duty upon the County to develop regulations protecting the health and safety of citizens from geologic hazards.

RCW 36.70A.170 requires the County to designate critical areas, which include geologically hazardous areas.[112] The County must use the BAS to designate the critical areas.[113] Thus the County was required to use the BAS to designate geologically hazardous areas.

Then RCW 36.70A.060(2) requires that the county adopt development regulations that protect critical areas. When it comes to protecting critical areas, the over-arching goal in the GMA is clearly to protect their "functions and values."[114] However, with regard to geologically hazardous areas, the legislature used this language:

> (9) **"Geologically hazardous areas"** means areas that because of their susceptibility to erosion, sliding, earthquake, or other geological events, **are not suited to the siting of commercial, residential, or industrial development consistent with public health or safety concerns.[115]**

On the one hand, the legislature directs counties to protect environmental functions and values from threats due to human activity. But on the other, the legislature defines geologically hazardous critical areas by the hazard environmental activity presents to humans.

Because of this dichotomy, the County (and past Board decisions) conclude that protecting functions and values of geologically hazardous areas is meaningless. Such a

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[112] RCW 36.70A.030(5)(e).
[113] RCW 36.70A.172.
[114] RCW 36.70A.172(1).
[115] RCW 36.70A.060(9). (Emphasis added).

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literal reading of the statute is tantamount to concluding that the legislature required the geologically hazardous areas to be designated for the purpose of ensuring that the hazard to public health and safety be preserved. That does not make sense.

RCW 36.70A.050(1) directs the department to adopt guidelines to guide the classification of critical areas. The department's guidelines read, in pertinent part:

> (1) Geologically hazardous areas. **Geologically hazardous areas** include areas susceptible to erosion, sliding, earthquake, or other geological events. They **pose a threat to the health and safety of citizens when incompatible commercial, residential, or industrial development is sited in areas of significant hazard.**
>
> (2) Some geological hazards can be reduced or mitigated by engineering, design, or modified construction or mining practices so that risks to public health and safety are minimized. **When technology cannot reduce risks to acceptable levels, building in geologically hazardous areas must be avoided.** [116]

I think it is more reasonable to conclude that the legislature requires the designation of areas where development presents a hazard to people and that the department guidelines direct counties to develop regulations that "avoid building" in those areas if risks cannot be reduced to "acceptable levels." Acceptable levels is not defined and, presumably, is a matter of legislative discretion. *See Tahoma Audubon et al. v. Pierce County*, GMHB No. 05-3-0004c (FDO, July 12, 2005) at 24-25.[117]

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[116] WAC 365-190-120. (Emphasis added).

[117] *Tahoma Audubon* was decided prior to the Department's adoption of the current guidelines, but it highlights the legislative discretion afforded counties. Finding that "no direct requirement in the GMA … would allow it to substitute its judgment for that of the Pierce County elected officials on this matter," the Board looked to the legislative record:

> At the August 5, 2003, meeting of the County Council Community Development Committee, after hearing Steve Bailey's presentation about lahar risks, Councilmember Wimsett put the issue in stark perspective:
>
> > ... [L]et's face it, if there's a major incident on Mt. Rainier, the casualties are going to be high. I mean very high. And you know I guess it boils down to what is okay. Is it okay to sacrifice two hundred and fifty people, but not three hundred or . . . I mean, where do you draw that line?
>
> HOM Ex. 1, at 16.
>
> The Board agrees with Pierce County that land use policy and responsibility with respect to Mount Rainier Case II lahars -- "low probability, high consequence" events -- is within the

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Therefore, I would decline to follow prior case decisions and conclude that the County is required to use the BAS to develop regulations pertaining to landslide-prone areas that reduce health and safety risks to "acceptable levels." Just as SEPA review requires that a legislative body be fully informed of the likely environmental impact of a legislative action, so also does the GMA require that a legislative body be informed by the BAS of the risk to human safety posed by geologically hazardous areas.

Here, the Petitioners have presented studies supporting the use of an area-volume calculation to analyze landslide runout distances and suggest that the County's reliance on a height-length calculation is inadequate.[118] The County responds that, based on a review of the studies sited by Petitioners as well as historical and other data, staff recommended providing for greatly increased runout distances – changing the height-length requirement for setbacks at the toe of the slope from one-half the height of the slope to twice the height of the slope, increasing the top of the slope setback, and including all of the setback area in the "landslide hazard area."[119]

While Petitioners do not agree with the County's decision, they have not carried their burden to show that the County failed to consider the BAS. Neither have they presented evidence that the County's regulations fail to reduce health and safety risks to acceptable levels. I am not convinced that the County's action was clearly erroneous and thus concur that Petitioners fail to establish violations of the GMA in regards to Issue C-1.

_____
Cheryl Pflug, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.[120]

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discretion of the elected officials; they bear the burden of deciding "How many people is it okay to sacrifice?"

[118] Petitioners' Prehearing brief at 33-34; IRE 3.1.5(93).

[119] Snohomish County Brief at 44-47.

[120] Should a party choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-3-830(1), WAC 242-3-840.A party aggrieved by a

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Appendix A

A. Did Snohomish County's adoption of Amended Ordinance No. 15-034; including amendments to and failures to adequately review and revise Chapter 30.62A SCC, violate RCW 36.70A.020(9) and (10); ~~RCW 36.70A.040(3);~~ RCW 36.70A.050 and the guidelines adopted under this section; RCW 36.70A.060(2); RCW 36.70A.130; ~~RCW 36.70A.160;~~ RCW 36.70A.170; RCW 36.70A.172; ~~RCW 36.70A.210;~~ RCW 36.70A.480; ~~the Countywide Planning Policies for Snohomish County Env-1, Env-2, Env-3, Env-4, Env-5, or Env-9; or Multicounty Planning Policies MPP-En-3, MPP-En-8 through MPP-En-12, MPP-En-13, MPP-DP-29, MPP-DP-30, or MPP-PS-20;~~ or Snohomish County General Policy Plan Goal NE 3, Objectives NE 1.C, 3.A and 3.B, and Policies NE 1.C.2, 1.C.3, ~~3.A.1,~~ 3.A.5, ~~3.B.1, 3.B.3, 3.B.4, 3.B.7, 3.B.8~~ and 3.B.10? These alleged violations include:

A1) That SCC 30.62A.020 fails to clarify the relationship between the Shoreline Master Program and the critical areas regulations and their applicability to various uses and activities, resulting [in] gaps in protection for critical areas and inconsistencies with Comprehensive Plan Policies. (Tribes Issue 2 and Futurewise Issues 1.2 and 2.3)

A2) That SCC 30.62A.320 allows critical area buffer reductions up to 50% including the buffer reductions from the "standard buffer width" in Table 2b, exceeding the recommendations of the best available science indicating that buffers should not be reduced by more than 20 to 25%, and creating inconsistencies with Comprehensive Plan policies. (Tribes Issue 4 and Futurewise Issue 1.4)

A3) That SCC 30.62A.320(1)(c) and SCC 30.62A.520(4) allow an increase in impervious surfaces within a 300-foot management area next to streams or rivers containing salmonids without regard to the best available science, without giving special consideration to the conservation or protection measures necessary to preserve or enhance anadromous fisheries, and resulting in inconsistencies with Comprehensive Plan policies. (Tribes Issue 6 and Futurewise Issue 1.4)

A4) That SCC 30.62A.520 fails to apply best available science or to give special consideration to conservation or protection measures necessary to preserve or

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final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. The petition for review of a final decision of the board shall be served on the board but it is not necessary to name the board as a party. See RCW 36.70A.300(5) and WAC 242-03-970.It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

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enhance anadromous fisheries, and creates inconsistencies with Comprehensive Plan policies, because it allows a 4000 square foot building a driveway envelope to any applicant within a constrained lot, in a critical area buffer, essentially replacing a case-by-case reasonable use determination necessary to avoid unnecessary impacts to critical areas and their buffers. (Tribes Issue 7 and Futurewise Issue 1.4)

A5) That SCC 30.62A.150, .310(3)(b)(iii) & .320(3) fail to apply best available science, fail to protect the functions and values of critical areas, and are inconsistent with Comprehensive Plan policies because they allow mitigation ratios as low as 1:1 for replacement of critical areas, and repeal the earlier standard for monitoring mitigation without including a new standard. (Tribes Issue 8 and Futurewise Issues 1.4 and 1.3)

A6) That SCC 30.62A.340(1) fails to apply the best available science or provide consistent standards in relation to the Stormwater Code[121] and Comprehensive Plan policies because it protects only Category I bogs from stormwater discharges. (Tribes Issue 9 and Futurewise Issue 1.4)

A7) That SCC 30.62A.010(1) fails to apply the best available science and WAC 365-190-130, and creates inconsistencies with Comprehensive Plan Policies, because it fails to include an updated list of critical area designations. (Tribes Issue 1).

A8) That Amended Ordinance No. 15-034 fails to apply the best available science or to provide internally consistent standards between the critical area regulations, the Shoreline Management Program Policies 3.2.5.3, ~~3.2.5.4,~~ 3.2.5.14, and 3.2.5.15, Shoreline Code, SCC 30.67.515, ~~.520, .570,~~ .575 ~~and .599,~~ and Comprehensive Plan policies, as relates to the regulation of bulkheads, piers, and floats, and other activities on shorelines. (Tribes Issue 3).

A9) That SCC 30.62A.160 fails to apply the best available science and is inconsistent with Comprehensive Plan policies because it allows for the protection of critical areas and buffers in easements, rather than separate tracts. (Tribes Issue 5)

A10) That SCC 30.91B.190 fails to apply the best available science and is inconsistent with Comprehensive Plan policies by failing to update or clarify the definition of a “buffer” as pertains to critical areas, because the county’s

[121] SCC 30.63A.570

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interpretation of this definition excludes critical area protection in areas that have already been impacted such that naturally occurring or re-established vegetation are absent. (Tribes Issue 10)

B. Did Snohomish County's adoption of Amended Ordinance No. 15-034; including amendments to and failures to adequately review and revise Chapter 30.62A SCC, Wetlands and Fish & Wildlife Habitat Conservation Areas, Chapter 30.62B SCC, Geologically Hazardous Areas, Chapter 30.62C SCC, Critical Aquifer Recharge Areas, and repealing Chapter 30.64 SCC, Groundwater Protection; violate RCW 36.70A.020(9) and (10); ~~RCW 36.70A.040(3);~~ RCW 36.70A.050 and the guidelines adopted under this section; RCW 36.70A.060(2); RCW 36.70A.130; ~~RCW 36.70A.160;~~ RCW 36.70A.170; RCW 36.70A.172(1); ~~RCW 36.70A.210; RCW 36.70A.480; the Countywide Planning Policies for Snohomish County Env-1, Env-2, Env-3, Env-4, Env-5, or Env-9; or Multicounty Planning Policies MPP-En-3, MPP-En-8 through MPP-En-12, MPP-En-13, MPP-DP-29, MPP-DP-30, or MPP-PS-20~~ because Amended Ordinance No. 15-034 fails to properly designate or protect wetlands, fish and wildlife habitat conservation areas, open space corridors, surface and ground water, aquifer recharge areas, or geological hazards? These alleged violations include:

1) That SCC 30.62A.010, SCC 30.62A.130, and SCC 30.62A.140 fail to apply the wetland and fish and wildlife habitat conservation regulations to all forms of development that can damage these habitats, fail to require the identification of all critical areas that can harm people and property, fail to protect the functions and values of critical areas, and are not based on best available science. (Futurewise Issue 1.1)

2) That the buffers, uses, activities, impervious surfaces, and mitigation allowed by SCC 30.63A.160, ~~SCC 30.63A.200,~~ SCC 30.62A.310, SCC 30.62A.320, SCC 30.62A.340, SCC 30.62A.350, SCC 30.62A.520, SCC 30.62A.550, SCC 30.62A.620, SCC 30.62A.630, SCC 30.62A.640, SCC 30.62B.330, SCC 30.62B.530, and SCC 30.91B.190 fail to protect the functions and values of critical areas and are not based on best available science. (Futurewise Issue 1.4)

3) That the uses, activities, impervious surfaces, development, and surface diversions and ground water withdrawals allowed by ~~SCC 30.62B.520, SCC 30.62B.530,~~ SCC 30.62B.540, ~~SCC 30.62C.010,~~ SCC 30.62C.130, SCC 30.62C.140, ~~and SCC 30.62C.340~~ fail to protect the functions and values of critical areas including critical aquifer recharge areas and surface and ground water and are not based on best available science. (Futurewise Issue 1.5)

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C. Did Snohomish County's adoption of Amended Ordinance No. 15-034, including amendments to and failures to adequately review and revise Chapter 30.62B SCC, Geologically Hazardous Areas, violate ~~RCW 36.70A.020(2), (6), (7), and (10); RCW 36.70A.040(3); RCW 36.70A.050 and the guidelines adopted under this section;~~ RCW 36.70A.060(2); ~~RCW 36.70A.130;~~ RCW 36.70A.170; RCW 36.70A.172(1); ~~RCW 36.70A.210; RCW 36.70A.480; or Multicounty Planning Policies MPP-En-9 or MPP-T-8~~ because Amended Ordinance No. 15-034 fails to properly designate or protect geologically hazardous areas? These alleged violations include:

1) That SCC 30.62B.010, SCC 30.62B.130, SCC 30.62B.140, SCC 30.62B.160, ~~SCC 30.62B.210,~~ SCC 30.62B.320, SCC 30.62B.340, and SCC 30.91L.040 fail to apply the geologically hazardous regulations to all forms of development that can damage these areas or be damaged by them, fail to designate and require the identification of all critical areas that can harm people and property, fail to protect people and property from these natural hazards, and the regulations are not based on best available science. (Futurewise Issue 2.1)

2) The designation of landslide hazards and the protections authorized by SCC 30.62B.390 are discretionary, lack sufficient standards, and fail to protect people and property from landslide hazards, and are not based on best available science. (Futurewise Issue 2.2)

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